## MOHIDEEN KUTTY & ANOR. v. WONG KIAN CHONG & ANOR.

**[F.C. (Wan Suleiman F.J., Syed Othman F.J. & Hashim Yeop A. Sani J.) January 15 & December 13, 1980]**
**[Kuala Lumpur — Federal Court Civil Appeal No. 76 of 1978]**

*Landlord and Tenant — Notice to quit — Acceptance of increased rent after notice to quit — Death of tenant — Whether tenancy continued to be held by widow — Business premises — Licencees in possession — Action to recover possession — Whether widow must be made party — Control of Rent Act, 1966, ss. 2, 9(2) & 16(2).*

*Evidence — Proof that a person is alive — Evidence Act, 1950, ss. 107 & 108.*

The respondents had sued the appellants for vacant possession alleging that the appellants were employees of one Kunji Koya who died on January 31, 1972, from which date they claimed the appellants had became trespassers. The premises had been let to Kunji Koya but the respondents had issued a notice to quit to him when he failed to agree to an increase of rent of $45 per month. Subsequently the respondents accepted an increase of $30 per month. The respondents claimed that Kunji Koya had became a statutory tenant after the notice to quit. Kunji Koya's wife and children were in India and when he was in India he left the shop in the care of the appellants. After Kunji Koya died the respondents served notice to quit on the Chief Justice. The learned trial judge found in favour of the respondents. The appellant appealed.

**Held:** (1) the notice to quit was a statutory prelude to the increase in rent and a new tenancy was created when the increased rent was agreed upon. This new tenancy was still under the protection of the Control of Rent Act, 1966;

(2) after the death of the tenant, the widow continued to be the tenant or alternatively the tenancy vested with the personal representatives. As the widow had taken out letters of administration, she should have been made a party to the action and the failure to do so was fatal to the respondent's case;

(3) the landlords had no right to proceed direct against the appellants who were at the least licensees of the premises.

*Cases referred to:-*

(1) *Labrooy* v. *Sharma* [1951] M.L.J. 127, 128.
(2) *Chanan Singh* v. *Thiyagaletchumi* [1965] 2 M.L.J. 158, 160.
(3) *Allagappa Chettiar* v. *Kader & Ors.* [1939] M.L.J. 304.
(4) *Yap Cheng Kee* v. *Ow Giam Eng* [1977] 1 M.L.J. 177.
(5) *United Overseas Bank Limited* v. *Sin Bian Sea Transport* [1968] 2 M.L.J. 69.
(6) *Brown* v. *Draper* [1944] 1 All E.R. 246.
(7) *Fred Long & Sons Ltd.* v. *Burgess & Anor.* [1949] 2 All E.R. 484.
(8) *Sweeny* v. *Sweeny* [1876] I.R. 10 C.L. 375.
(9) *Daeng Mohamadally* v. *Thanapakiam* [1957] M.L.J. 177, 178.

FEDERAL COURT.

*R.R. Chelliah* (*N. Ramachandran* with him) for the appellants.

*Atma Singh Gill* for the respondents.

*Cur. Adv. Vult.*

**Wan Suleiman F.J.** (delivering the judgment of the Court): The respondents in the appeal had sued the appellants (defendants) for vacant possession of premises at No. 1, Birch Road, Seremban, alleging that the appellants were employees of one Kunji Koya who had died on January 31, 1972, from which date the appellants had therefore been trespassers.

On behalf of the plaintiffs two witnesses were called. A previous co-owner, who had sold the premises to plaintiffs said that Kunji Koya was already the tenant when he and the other co-owner purchased the premises in 1969, and after he had failed to get the latter to pay an increase of rent of $45 p.m., he had issued Kunyi Koya a notice to quit, and had accepted a $30 p.m. increase only under protest. This notice founded plaintiffs' claim that Kunji Koya was a statutory tenant when the plaintiffs became the new owners.

The first plaintiff said that when he and his wife bought the premises, he continued the practice by the previous owners of issuing receipts with three conditions endorsed on the back. The most important were the second and third which specified that if the tenant sublets the premises the landlord was entitled to repossess it. Kunji Koya was apparently aware of these conditions all along. This witness said that Kunji Koya's wife and children were in India, that Kunji Koya had said the shop would be in the care of his employees, the two defendants whilst he was in India: also that he the witness was unaware of the partnership agreement of May 1971.

The gist of the statement of defence is this: Whilst admitting that the premises is controlled premises they denied that the contractual tenancy had been terminated or that any statutory tenancy had been created; that until October 21, 1971 Kunji Koya had been the tenant and that from October 22, 1971 he and the two defendants were partners and tenants of the premises until his death on January 31, 1972, after which Kunji Koya's estate or widow and defendants were the lawful tenants.

Alternatively defendants contended that they were occupying the premises as lawful subtenants of Kunji Koya; and finally that the proper parties were not before the court.

It would be noted that it is not in dispute that the tenants were protected by the Control of Rent Act.

Mr. Ramachandran for the defendants elected not to call any witness, resting his case on his submissions.

The learned trial judge found in favour of the plaintiffs, and defendants now appeal.

Before us Mr. Chelliah for the appellants submits that when the previous landlord tried to raise the rent to $135 p.m. in May 1969 and accepted $120 p.m., despite the without prejudice endorsement thereon, a new contractual tenancy, superseding the old was created, still covered by the 1966 Rent Acts. As we understand it learned counsel regards the notice to quit as a determination of the tenancy in accordance with section 9(2) of the Act, as a statutory prelude to the increase. *Labrooy* v. *Sharma*[1] and *Chanan Singh* v. *Thiyagaletchumi*[2] were cited in support of this proposition.

It was argued that in August 1970 respondents bought the house and became landlords subject to the former contractual tenancy. Right up to the time of Kunji Koya's death on January 31, 1972, it was con-

tended that he was still the contractual tenant of the respondents, a tenancy which had commenced in June 1969 when the then landlords accepted an increased rent of $120. We are inclined to agree with Mr. Chelliah that the notice is of the sort envisaged in section 9(2), and the words "without prejudice" on the receipts were of no effect at all. Moreover we hold that this new tenancy would still be under the protection of the Act.

Section 2 of the Act, submits Mr. Chelliah, includes widow in the definition of tenant — "tenant ... includes a widow of a tenant who was residing with him at the time of his death". Under section 16(2) of the same Act, since the premises are business premises, there is no need at law for either the tenant or his widow to be resident therein.

Alternatively subsequent upon the death of a contractual tenant the tenancy would rest in his personal representatives for which proposition of law, we were referred to *Allagappa Chettiar* v. *Kader & Ors.*[3] and *Yap Cheng Kee* v. *Ow Giam Eng.*[4] After Kunji Koya's death, solicitors for the plaintiffs served notice on the Chief Justice because the widow had not applied for Letters of Administration.

Therefore whether it was a contractual or a joint tenancy, it was still alive, and the landlords have no right to proceed direct against appellants who were at least the licensees, in addition to being the deceased's partners.

That the appellants were at least licensees, we would agree there can be no question. Apart from being partners in the business, and therefore being licensed to be on the premises by the deceased Kunji Koya, 1st appellant had been appointed attorney with full powers by the widow on April 9, 1973 and he in turn had appointed 2nd appellant to look after the business. It would be reasonable to hold that if they were not joint tenants with the deceased, and that by virtue of section 2 the widow was the tenant on his death then at least they were, as her agents, licensed to remain on the premises.

It was held in *United Overseas Bank Limited* v. *Sin Bian Sea Transport*[5] following the English case of *Brown* v. *Draper*[6] that the court has no jurisdiction to make an order for the recovery of possession against a licensee of a statutory tenant, even though the statutory tenant was not in physical possession of the premises and had no *animus revertendi*, unless the statutory tenant was made a party to the proceedings.

The reason for this is, as it was said in *Brown* v. *Draper*, that unless and until the tenant yields possession or has an order of possession made against him, the protection of the Acts extends to protect the licence of the tenant, not because the licensee can claim the protection of the Acts personally, but because the possession of the licensee must be taken to be the possession of the tenant.

The widow had taken out Letters of Administration in 1974, and this suit was filed on November 4, 1976. She should therefore, it was urged, have been made a party.

For the respondents, Mr. Atma Singh informed us that this suit, far from commencing on the date mentioned, had commenced as Magistrates' Court, Seremban Civil Suit 140/1973 in 1973, when it had been struck out with liberty to file afresh.

He relied on the Court of Appeal decision in *Fred Long & Sons Ltd.* v. *Burgess & Anor.*[7] in support of the proposition that the doctrine of relation back does not apply here.

The facts of that case are as follows:

"On November 7, 1948, the contractual tenant of a dwelling-house to which the Rent Restrictions Acts applied died intestate, and on November 18 the landlords served a notice to quit on the President of the Probate, Divorce and Admiralty Division of the High Court, in whom the tenancy was vested under the Administration of Estates Act, 1925, section 9. A week later they started an action for possession against the sons of the deceased tenant who had continued to live in the house after the tenant's death. On January 15, 1949, one of the sons obtained a grant of letters of administration, and he contended that by the doctrine of relation back the estate of the deceased tenant, including her contractual tenancy, was vested in him as from the date of her death, and, therefore, as he was a person deriving title under the original tenant, within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, section 12(I)(f), he was entitled to the protection of the Rent Restrictions Acts."

It was held the doctrine of relation back could be applied only to protect the estate from wrongful injury occurring in the interval between the death of an intestate and the grant of letters of administration, and could *not* be applied so as to invalidate interests lawfully acquired in the interval, *or* so as to give the administrator a title to something which had been extinguished in the interval without the fault of anyone; the contract of tenancy which was vested in the President of the Probate, Divorce and Admiralty Division on the death of the tenant intestate, was validly terminated by the notice to quit served on the President on November 18, 1948; and the doctrine of relation back cannot be applied so as to include in the subsequent grant of Letters of Administration the tenancy which had been extinguished.

The facts here are different. The widow had when the writ was filed afresh, this time, not in the Sessions Court, but in the High Court on November 3, 1976, already taken out Letters of Administration (in 1974) and should indeed have been joined as a party.

Mr. Atma Singh also relied on a passage from *Sweeny* v. *Sweeny*[8] cited with approval in *Daeng Mohamadally* v. *Thanapakiam*[9] which reads:

"Why should he (the landlord) be placed in a worse position by the death of the tenant than he would have been if the tenant had lived ... when the tenant is dead the landlord should be entitled to treat the person he finds in possession as the representative of the estate and deal with him and it accordingly."

It was therefore held, in the latter case that it was sufficient to serve the notice to quit on the person in occupation of the premises.

Learned counsel for the respondent failed to note, however that the facts in *Mohamadally's* case are entirely different from those in the present appeal.

There, the premises was clearly residential, neither the deceased tenant nor his widow had ever resided there from the commencement, and the court found as of fact that the tenant had in his lifetime abandoned the tenancy.

We therefore hold that failure to make the widow a party is fatal to the respondents' case.

Finally, our attention was drawn to that portion of the judgment in which his Lordship clearly held the view that the onus lay on the appellants to prove that the widow is alive. The fact that the widow had executed a power of attorney in India on April 4, 1973 and extracted letters of administration through her attorney on April 14, 1974 is not in doubt. The learned judge however held that this was no proof that she was still alive thereafter.

Attention of this court was obviously not drawn to the provisions of sections 107 and 108 of the Evidence Act, which are set out hereunder:

"107. When the question is whether a man is alive or dead and it is shown that he is alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

"108. When the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden that he is alive is shifted to the person who affirms it."

It was certainly not part of respondent/plaintiff's case that the widow was dead at material times, and indeed if he had, the burden would be upon him to prove her death.

Therefore on the pleadings, the appellants are entitled to succeed, for under section 16(2), "the tenant or a member of his family shall be deemed to have occupied business premises so long as he uses such premises for his business or trade, notwithstanding that such ... member of his family does not reside therein."

The appellants could therefore in no sense be termed trespassers.

We would therefore allow the appeal with costs.

*Appeal allowed.*

Solicitors: *N. Ramachandran & Co.; Gill & Tang.*

---

## AMOS WILLIAM DAWE v. DEVELOPMENT & COMMERCIAL BANK (LTD.) BERHAD

**[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Chang Min Tat F.JJ.) November 19 & December 17, 1980]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 149 of 1979]**

*Practice and Procedure — Appellant adjudicated a bankrupt in Singapore — Reciprocal arrangements with Singapore — Application to strike out appeal — Application by appellant to adduce further evidence and for leave to file counterclaim — Pleadings — Costs — Bankruptcy Act, 1967, ss. 8 & 104.*

*Bankruptcy — Appellant adjudicated a bankrupt in Singapore — Reciprocal arrangements with Singapore — Bankruptcy Act, 1967, ss. 8 & 104.*

*Costs — Bankrupt client — Proceedings begun notwithstanding — Solicitors personally liable for costs.*

The respondent bank had claimed the sum of $600,000 in respect of a continuing guarantee and indemnity given by the appellant for the grant of banking facilities to a company. The defence of the appellant was a total denial of any knowledge of the indemnity or the advance to the company. The respondents applied for the defence to be struck out and for leave to sign final judgment. This was granted and the appellant appealed. The appellant applied to adduce further evidence and for leave to file a counterclaim. The application was supported by an affidavit in which the appellant contended that the guarantee was for $500,000 only, that it was to be joint and several with others and that the Bank was in breach of a promise to buy certain shares from him. It transpired that the appellant had been adjudicated a bankrupt by the High Court in Singapore prior to the filing of the action.

**Held:** (1) as the appellant had been adjudicated a bankrupt in Singapore, the appeal must be struck out and the judgment of the High Court in the action set aside;

(2) as the appellant had not sought to amend his defence, the Court could not in the circumstances consider any affidavit by the appellant which not only purportedly raised issues of fact not averred to in the pleadings but which also flatly contradicted his own pleadings. No order would therefore be made on the motion to adduce further evidence;

(3) in this case there was no action in existence to which the counterclaim can be made and moreover the appellant had been adjudicated a bankrupt and could not pursue the claim;

(4) in the circumstances the costs of the proceedings after the fact of the bankruptcy became known to the solicitors for the appellant, should be borne by the solicitors personally.

*Cases referred to:-*

(1) *C.S.I. International Co. Ltd.* v. *Archway Personnel (Middle East) Ltd.* [1980] 1 W.L.R. 1069; [1980] 3 All E.R. 215.

(2) *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489.

(3) *Chai Yen* v. *Bank of America National Trust and Savings Association* [1980] 2 M.L.J. 142.

FEDERAL COURT.

*R. Padmanabhan* for the appellant.

*T. Thomas* for the respondent.

*Cur. Adv. Vult.*

**Chang Min Tat F.J.** (delivering the judgment of the Court): We have before us two motions. The first in time is by the respondent to strike out the appeal on the grounds of the appellant's incompetency personally to lodge and prosecute any appeal or any action after he had been adjudicated a bankrupt and a receiving order made against him. The second is by the appellant to adduce further evidence.

The background to the case is as follows: The respondent Bank had in the action claimed from the appellant $600,000 in respect of a continuing guarantee and indemnity given by the appellant for the grant of banking facilities to Han City Textiles Industries Bhd. (the company) and interest. The advance to the company is in excess of $1½ millions, but the claim against the guarantor is limited to the amount in the guarantee. The facts of the claim are simple and uncomplicated, the cause of action is clear and the indorsement of the statement of claim in the specially indorsed writ of summons does not need to be of any length or intricacy. But the defence, such as it is, is of equal brevity. It is a total denial of any knowledge of the indemnity or the advance to the company, though it admits the demand made on the appellant. It must be presumed that the defence was drafted on the appellant's instructions.